CREDIT CORP. (M) BHD.

v.

BULAN SABIT SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[CIVIL SUIT NO. C2-23-4108-86]
10 FEBRUARY 1988

COMPANY LAW: *Company under receivership - Whether leave of Court necessary before commencement of action.*

CIVIL PROCEDURE: *Summary judgment application - Whether unconditional leave to defend should be granted - Whether there were triable issues.*

CONTRACT: *Clause in agreement allowing plaintiff to sue for lease instalments unpaid, interest charges and various other charges - Whether clause was a penalty clause - Question of what the plaintiff entitled to as reasonable compensation.*

HIRE PURCHASE: *Leasing - Lease agreement - First defendant defaulted in payment of instalments - Claim for all unpaid instalments, interest charges and other charges against third defendant as guarantor.*

The plaintiff sued the third defendant as guarantor in respect of a lease agreement entered into between the plaintiff and the first defendant for all unpaid lease instalments, interest charges and other charges. Prior to the action being commenced the first defendant was placed under receivership.

The plaintiff applied for leave to sign final judgment against the third defendant under O. 14 of the Rules of the High Court 1980 and the third defendant obtained conditional leave to defend. The third defendant applied for further arguments in open Court.

Held:

[1] That leave under s. 226 of the Companies Act was not required in respect of the first defendant as leave would only be required if the company had been wound up or a provisional liquidator had been appointed.

[2] That there was an issue to be tried as to what amounted to reasonable compensation that the plaintiff was entitled to by way of damages in view of s. 75 of the Contracts Act.

[3] That the plaintiff had a duty to mitigate its loss and the plaintiff had to show that it had done so in respect of the measures it adopted for the disposal of the leased goods.

[Unconditional leave to defend granted to the third defendant. Costs of appeal and application before Senior Assistant Registrar to be taxed and paid by the plaintiffs in any event.]

Cases referred to:

Wearne Brothers (M) Ltd. v. Jackson [1966] 2 MLJ 155
Lombard North Central plc v. Butterworth [1987] 1 All ER 267
O'Dea & Ors. v. Allstates Leasing System (WA) Proprietary Limited & Ors. [1982-83] 152 CLR 359

Legislation referred to:
Companies Act 1965, s. 226
Contracts Act 1950, s. 75

For the plaintiffs - W.M. Chang; M/s. Mah Kok & Din
For the third defendant - Philip Nainan; M/s. Philip Nainan & Co.,

JUDGMENT

Mahadev Shankar J:

In this case I had granted conditional leave to defend to the third defendant in an O. 14 application. The third defendant is a guarantor to a leasing agreement.

He applied for further arguments in open Court.

The total rental payable under the leasing agreement was RM229,759.84. This was payable in thirty-six instalments. The first defendant, the principal debtor under the leasing agreement, defaulted in making the first payment from 9 May 1984. The first defendant continued in default. On 17 November 1984 the first defendant went into receivership under a debenture. On 27 November 1984 the plaintiffs repossessed. But they did not succeed in selling the equipment until 27 March 1986.

After repossession they sued for the thirty-five remaining instalments unpaid, interest charges on these unpaid amounts up to the sale i.e., on 27 March 1986 and they claimed for various other charges.

Mr. Philip Nainan of Counsel took the following points as to why unconditional leave should be granted.

Firstly it was submitted that under s. 226 of the Companies Act, leave of the Court should have been obtained before this suit was filed. Since it was not, the entire action was said to be bad. With this submission I do not agree. Leave under s. 226 of the Act would only be required if the company had been wound up or a provisional liquidator appointed by the Court.

The second point which he made was that by virtue of the receivership on 17 November title to the equipment had passed to the receivers. Therefore the repossession on 26 November was said to be bad. With this submission also I do not agree. We are not concerned here with a hire purchase agreement where there is an option to purchase or some other kind of agreement where some title to the goods is vested in the hirer. In this case it was a leasing agreement pure and simple and the hirers had no title to the goods whatsoever, only a licence to use the equipment whilst the agreement was enforced. Consequently the second point also fails.

The third point raised by Mr. Philip Nainan is on s. 75 of the Contracts Act and the cases of *Wearne Brothers (M) Ltd. v. Jackson* [1966] 2 MLJ 155 and *Lombard North Central plc v. Butterworth* [1987] 1 All ER 267. The submission was that Clause 8 of the agreement which purportedly gave the plaintiff a right to sue for all that they have sued for in this case was in fact a penalty clause which was oppressive and unconscionable. So he submitted that there was an issue to be tried on the question of what reasonable compensation the plaintiffs were entitled to by way of damages.

With this submission I entirely agree. I drew the attention of Counsel to the Australian High Court's case of *O'Dea & Ors. v. Allstates Leasing System (WA) Proprietary Limited & Ors.* [1982-83] 152 CLR 359. That case is right on point. Mr. Chang of Counsel for the plaintiffs was unable to distinguish it and on this ground alone unconditional leave to defend followed as a matter of course.

Mr. Chang sought to submit that since liability was not disputed in this case and the question was purely one of quantum, the Court should nevertheless enter judgment for the plaintiffs and leave the damages to be assessed. In this case he submitted that the assessment would be academic because the amount claimed for by the plaintiff accurately represented what they were entitled to under the terms of the agreement.

I was totally unable to accept the submission. The claim for the plaintiffs was not one for a liquidated demand. In this kind of claim the action is for unliquidated damages and O. 14 is wholly inappropriate. One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation. What is reasonable in any particular case is more than a matter of mathematics.

The last point which Mr. Nainan urged was also a triable issue. The long delay between the date of repossession and the date of the sale did raise a question as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

In the circumstances I allowed the third defendant's appeal from the decision of the Senior Assistant Registrar and gave unconditional leave to defend. I also ordered that the costs of this appeal and of the application before the Senior Assistant Registrar be taxed and paid by the plaintiffs to the third defendants in any event.

Also found at [1989] 1 CLJ 912